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Supreme Court of the United States.

OCTOBER TERM, 1951.

COMMONWEALTH OF MASSACHUSETTS,
DIVISION OF EMPLOYMENT SECURITY, CREDITOR,
Petitioner,
v.
HUBERT C. THOMPSON, RECEIVER,
Respondent.

IN THE MATTER OF
PLYMOLD CORPORATION, DEBTOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named Petitioner, pray that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the First Circuit, entered June 7, 1951, in the above-entitled case, docketed therein as No. 4545.

Opinions Below.

A memorandum opinion was filed in the District Court of the United States for the District of Massachusetts on August 23, 1950, by Sweeney, Ch. J., and appears at page 3 of the record.

The opinion of the United States Court of Appeals for the First Circuit appears at page 21 of the record, and is reported in 190 F. (2d) 10.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 7, 1951 (R. 24). By order of the Chief Justice of this Honorable Court dated August 27, 1951, the time within which a petition for a writ of certiorari might be filed was extended to and including October 5, 1951. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254.

Questions Presented.

1. Whether the debtor in this arrangement proceeding under Chapter XI of the Bankruptcy Act is liable for interest upon delinquent taxes owed to the Petitioner under Massachusetts General Laws, Chapter 151A, the Employment Security Law, from and after the date of the filing of the proceeding until those tax claims are paid.

If this question is answered by this Honorable Court in the affirmative, no further questions are before the Court; but if the answer is in the negative, in the instant case the further questions arise:

2. The fourth quarter tax of 1946, together with interest to date of payment having been paid by the Debtor on

November 3, 1948, voluntarily and without controversy, in return for which a proof of credit was procured by the Debtor, was it proper under such circumstances to order the Commonwealth to return any portion of such interest to the Debtor?

3. Is the unpaid tax for the third quarter of 1947, which became due and payable after the appointment of the Receiver, an expense of the Receiver's administration and thus payable with interest to date of payment?

Statutes Involved.

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 11-14.

Statement.

There is no dispute as to the facts, which are briefly as follows:

An involuntary petition in bankruptcy was filed against the Debtor on August 23, 1947. Thereupon the Debtor filed a petition for arrangement under Chapter XI of the Bankruptcy Act. An amended plan of arrangement was filed on January 11, 1950, and confirmed (R. 4).

Employment security taxes were owed to the Commonwealth in accordance with the following schedule (R. 6):

Quarter ending	*Amount*	*Due date*
December 31, 1946	$6536.04*	January 31, 1947
March 31, 1947	3872.68	April 30, 1947
June 30, 1947	5146.93	July 31, 1947
September 30, 1947	1344.25	October 31, 1947

*This amount was later adjusted to $6530.96 (R. 11).

These taxes were paid as follows:

November 3, 1948—fourth quarter of 1946, including interest to date of payment (R. 4 and 11).

September 27, 1950—first three quarters of 1947, with interest only to August 23, 1947, the date of the involuntary petition in bankruptcy.

With respect to the first payment, this was voluntarily paid by the Debtor for the purpose of procuring a letter from your Petitioner in the nature of a proof of credit, for an offset against its obligations under Title IX of the Social Security Act, Tax on Employers of Eight or More, now contained in Subchapter C of Chapter 9 of the Internal Revenue Code, as amended, and cited as the Federal Unemployment Tax Act. The second payment, however, was made by order of the Referee in Bankruptcy, who disallowed interest on said payment after August 23, 1947, the date of the original proceeding, irrespective of whether the tax obligations accrued prior or subsequent to said date;* and the Referee further ordered a refund or credit to the Debtor in the sum of $432.87, being a part of the interest already paid on November 3, 1948.

The Referee and the Courts below relied on the decision of *New York* v. *Saper*, 336 U.S. 328 (R. 3, 5 and 22). Interest to date of payment for delinquent taxes becoming due and payable both prior and subsequent to August 23, 1947, the date of the original proceeding, was denied your Petitioner. The Referee also ordered a refund of a portion of the interest already paid on a liquidated tax obligation with respect to which no controversies existed until raised by the order of the Referee on the 15th day of June, 1950 (R. 8).

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*N.B. The tax for the quarter ending September 30, 1947, became due and payable on October 31, 1947, during the Receiver's administration of the arrangement proceeding.

Specification of Errors.

The Courts below erred in determining that the decision in the *Saper* case was authority for stopping the running of interest in this arrangement proceeding. The *Saper* case dealt with straight bankruptcy, which has for its purposes the liquidation of assets and distribution of same among creditors and the discharge of the bankrupt. In an arrangement proceeding, however, the whole scheme is calculated for the rehabilitation and reorganization of the Debtor, who parts with nothing and who is not even referred to as a "bankrupt." In this proceeding there was no involvement of liquidation, distribution or discharge. The Debtor in this case carried on business *as usual* from August 23, 1947 to September 27, 1950, and thereafter; and if allowed to use public funds without the payment of interest, the Court would thereby create a monopoly in favor of the Debtor over all other taxpayers, including its competitors.

Further error was committed (*a*) in requiring the Commonwealth to return moneys paid to it which were public funds impressed with a trust to be used exclusively for the *payment of benefits* to unemployed persons; and where no controversy existed at the time such payment was made, these moneys had previously been deposited with the Secretary of the Treasury of the United States as provided by General Laws of Massachusetts, Chapter 151A, Section 52, to the credit of the account of the Commonwealth in the unemployment trust fund established and maintained pursuant to Section 904 (a) of the Social Security Act; see also Section 1607 (f) of the Internal Revenue Code as amended (Federal Unemployment Tax Act, Chapter 9, Subchapter C); (*b*) in depriving the Commonwealth of interest which clearly is an expense of the Receiver in his administration of this arrangement proceeding, and payable by him as such.

Reasons for Granting the Writ.

Petitions for writs of certiorari have been filed this term with this Court in the following cases:

United States v. *Bloom*, numbered 100.
United States v. *Edens et al.*, numbered 299.
United States v. *General Engineering & Manufacturing Company*, numbered 300.

Your Petitioner adopts all of the reasons and arguments as set forth in the several petitions of the above-named cases and, moreover, points out that in the present case there was sharp division in the decision of the Court below on the basic issue involved. See *Commonwealth of Massachusetts* v. *Thompson* (R. 22-24), 190 F. (2d) 10, 12 (C.A. 1).

It is the prayer of the Petitioner that this petition be considered in conjunction with the petitions in the *Bloom*, *Edens* and *General Engineering* cases (*supra*).

Since the questions presented herein were not dealt with in the *Saper* case, it is most important that this Court remove all doubt as to whether its decision in the *Saper* case was intended to apply to proceedings other than straight bankruptcy, so that precedent and authority may be had for your Petitioner and all other Federal and State taxing authorities.

Respectfully submitted,
FRANCIS E. KELLY,
Attorney General,
JOHN A. BRENNAN,
Chief Counsel,
Division of Employment
Security,
For the COMMONWEALTH
OF MASSACHUSETTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Question 1.

It is respectfully submitted that Chapters I to VII of the Bankruptcy Act deal with straight bankruptcies, seeking liquidation and distribution of the bankrupt estate to creditors, and the discharge of the bankrupt. The remaining chapters of the Bankruptcy Act deal with matters far different from what is contemplated and embraced in straight bankruptcy proceedings. For example, relief to farmers and wage earners, reorganizations, arrangements, indebtedness of certain taxing districts and municipalities, maritime liens, etc. Obviously the treatment laid down in the *Saper* case cannot be so co-extensive as to cover all situations neither present nor decided in that case. Even in the *Saper* case exceptions were recognized (see Footnote 7, *Saper* case, *supra*).

Massachusetts General Laws (Ter. Ed.) Chapter 151A (the Employment Security Law), provides in Section 17 that unemployment contributions (taxes) are entitled to priority, subservient only to unpaid wage claims. Any contributions required of employers under this chapter, if not paid when due, carry interest at the rate of 6% per annum from due date until paid, and by the mandate of the Legislature (Section 15) the Director is required to collect the accruing interest, which becomes an accretion to the tax. The disallowance of this interest would violate the so-called absolute priority rule which was always invoked under the broad equity powers in cases other than straight bankruptcy. See dissenting opinion of Woodbury, Cir. J. (R. 22-24). The following authorities are cited in connection with the absolute priority rule:

6 Collier on Bankruptcy (14th Ed. by Moore and Oglebay, 1947), Sections 9.08 and 11.06.

Petition of Portland Electric Power Co. (*White* v. *Portland Electric Power Co.*) (C.A. 9th, 1947), 162 F. (2d) 618; certiorari denied, *sub. nom. Watson* v. *Portland Electric Power Co.* (1947), 332 U.S. 837.

In re Deep Rock Oil Corporation (*Standard Gas & Electric Co.* v. *Taylor*) (C.C.A. 10th, 1940), 113 F. (2d) 266; certiorari denied (1940), 311 U.S. 699.

In the instant case the Debtor is not a "bankrupt"; its assets have not been liquidated and distributed among its creditors, and at all times up to the present it has continued the operation of its business, having the use of public moneys to the unjust enrichment of the Debtor and to the detriment of the Unemployment Compensation Fund, created for the *payment of benefits* to the unemployed. We cannot believe that this Court intended to sanction the use of public moneys for private purposes, nor that the public interest should be defeated by applying to an arrangement proceeding the rule laid down in the *Saper* case.

Securities & Exchange Commission v. *United States Realty & Improvement Co.*, 310 U.S. 434, 452 (1940).

Susquehanna Chemical Corp. v. *Producers Bank & Trust Co.* (C.A. 3d, 1949), 174 F. (2d) 783, 786.

Lowden v. *Northwestern National Bank & Trust Co.* (1936), 298 U.S. 160, bottom of page 163.

Should the judgment of this Court be adverse to your petitioner on question 1, we respectfully submit the following in support of the further questions raised:

Question 2.

It is respectfully submitted that the Commonwealth should not be deprived of the interest paid to date of payment on November 3, 1948, for the delinquent fourth quarter tax of 1946. Since no controversy existed at the time of payment with regard to this item, the obligation was liquidated and the debt extinguished, and the question involved, if any, became moot.

> *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561.
>
> *In re Wolf Drug Corporation*, decided June 30, 1950, by the United States District Court, Southern District of New York, No. 86557; Commerce Clearing House Bankruptcy Law Reports, No. 317-39, July 25, 1950, par. 56738, at page 60227 (no other citation available).

The Summary of Memorandum by Kaufman, D.J., in the *Wolf Drug* case (*supra*) reads as follows:

> "Chapter XI Proceedings—Payment of Interest on Tax Claims—Lack of Controversy. The Chapter XI debtor's payment in full and agreement to pay in full of the interest on tax claims after the date of filing of the petition, notwithstanding the referee's disallowance, renders the case moot; there is no longer an actual controversy and the rendering of an advisory decision would be improper as well as a probable violation of Article 3, Section 2 of the Constitution which gives the federal courts jurisdiction to hear and determine only 'cases and controversies.' "

Question 3.

Certainly the Commonwealth should not be denied interest for late payment of taxes which became due as an expense of the Receiver's administration. This being an expense of administration, the Receiver conducting business must pay these taxes when due and payable, in default of which he is chargeable by law with interest which becomes a part of the tax, as in the case of any other taxpayer. He cannot have a monopoly in this respect. No such exemption is afforded him by law.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, by granting this petition for writ of certiorari, and thereafter reviewing and reversing the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,
FRANCIS E. KELLY,
Attorney General,
JOHN A. BRENNAN,
Chief Counsel,
Division of Employment
Security,
For the COMMONWEALTH
OF MASSACHUSETTS.

APPENDIX.

General Laws of Massachusetts (Ter. Ed.) Chapter 151A (as amended by Statute 1941, Chapter 685, Section 1):

Section 15(*a*):

"If any employer fails to pay when due any amount required of him under this chapter, such overdue amount *shall* carry interest at the rate of six per cent per annum from the due date until paid, or the director *may* assess upon such employer in lieu of such interest a penalty of five dollars a day for one or more days, but not exceeding the number of days during which such employer is in default." (Italics ours.)

Section 16:

"Judgments recovered under any provision of section fifteen and overdue contributions, with interest thereon or penalties assessed in lieu thereof, shall, until collected, be a *lien* against the assets of the employer, subordinate, however, to claims for unpaid wages and prior recorded liens; . . ." (Italics ours.)

Section 17:

"Contributions and interest thereon or penalties assessed in lieu thereof, shall have *priority* over all other claims against an employer, *except wage claims.*" (Italics ours.)

Section 52:

"All moneys requisitioned from the commonwealth's account in the unemployment trust fund in the United States treasury and received by the director from the state treas-

urer shall be immediately deposited in a benefit account maintained by the director. All moneys in the benefit account shall be used *exclusively* for the *payment of benefits* pursuant to this chapter." (Italics ours.)

Bankruptcy Act (United States Code, Title 11) as amended generally by Act of June 22, 1938 (Chandler Act):

SEC. 397. Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter, and have not been assessed prior to the date of the confirmation of an arrangement under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from, and shall be paid by the debtor or the corporation organized or made use of for effectuating an arrangement under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any arrangement dealing with the assumption, settlement, or payment of any such tax. [11 U.S.C., 1946 ed., Sec. 797.]

Social Security Act, as amended:

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

Unemployment Trust Fund

. . . . . .

SEC. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund," hereinafter in this title

called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund, or by the Railroad Retirement Board to the credit of the railroad unemployment insurance account, *or deposited pursuant to appropriations to the Federal unemployment account.* Such deposit may be made directly with the Secretary of the Treasury or with any Federal Reserve bank or member bank of the Federal Reserve System designated by him for such purpose. [42 U.S.C., 1946 ed., Sec. 1104.]

Internal Revenue Code, as amended:

FEDERAL UNEMPLOYMENT TAX ACT (TAX ON EMPLOYERS OF EIGHT OR MORE), CHAPTER 9, SUBCHAPTER C.

. . . . . .

SEC. 1607. DEFINITIONS.

. . . . . .

(f) UNEMPLOYMENT FUND.—The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended, shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund

was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and funds paid in accordance with the provisions of section 1606 (b): *Provided*, That an amount equal to the amount of employee payments into the Unemployment Fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration. [26 U.S.C., 1946 ed., Sec. 1607.]